

“Exceptions and limitations” in copyright vital for South countries

by Teresa Hackett

Flexibilities in the area of copyright, known as exceptions and limitations, are important especially for developing countries.

On 3-7 November 2008, the World Intellectual Property Organisation (WIPO)'s Standing Committee on Copyright and Related Rights (SCCR) resumed discussions on the issue following the start of earnest discussion at the 10-12 March meeting.

In their preliminary remarks, developing countries highlighted their need for flexibilities offered by exceptions and limitations due to their socioeconomic conditions, including technological, financial and human resource constraints. Indeed, they view their capacity to access knowledge goods as being defined primarily by exceptions and limitations.

The debate is overdue as countries grapple with how to extend and apply exceptions and limitations to the digital environment. Entrepreneurs developing innovative information and communication technology (ICT) services and users of copyrighted material have experienced obstacles and legal uncertainty. This has undermined the development and use of digital technologies which have so much to offer developing countries.

Copyright law

The original purpose of copyright law is to encourage creativity and learning. It grants legal protection to creators to exploit their works, while also enabling access by society to encourage research, innovation and further creativity.

Therefore, copyright was meant to balance the need to protect creators with the user's need to access information and knowledge goods. This balance is sought in two ways. First, the right is granted for a limited amount of time. The international standard term of protection for a literary work is the author's life plus 50 years after death (latterly other countries, led by Europe and the US, have extended the term of protection).

Second, the rights are subject to certain exceptions and limitations to enable access to copyrighted works. Exceptions and limitations are therefore a fundamental part of the copyright system – a mechanism for access to knowledge and thus for human social and economic development.

The world's first international copyright treaty, the Berne Convention for the Protection of Literary and

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Artistic Works (1886), which is incorporated into the World Trade Organisation (WTO)'s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), sets out the exclusive rights granted to creators and other rightsholders. The Convention also makes provision for a variety of exceptions and limitations subject to certain conditions.

The WIPO Copyright Treaty (WCT) Agreed Statement concerning Article 10 Limitations and Exceptions states that countries may carry forward and extend into the digital environment exceptions and limitations in their national laws which have been considered acceptable under the Berne Convention and that new exceptions and limitations appropriate to the digital environment may be devised.

Save for Article 10(1) of the Berne Convention which permits quotation of copyrighted works, exceptions and limitations are discretionary and are left for national governments to decide. This provides countries with the flexibility to create access regimes that meet national educational, cultural and development needs.

However, the fact that copyright owners' exclusive rights are international and guaranteed, and exceptions and limitations to the monopoly rights are national and optional, is perceived as creating an inherent imbalance in the copyright system.

It has led to a patchwork of national exceptions and limitations that do not adequately meet the needs of the global networked environment, hindering in particular cross-border activities such as distance learning, digitisation projects by libraries and exchange of material in accessible formats for blind and visually impaired people.

In addition, revisions and new treaties over the years have introduced new exclusive rights, new subject matter and new modes of exploitation. Exceptions and limitations have not evolved at the same pace as the development of authors' and other rightsholders' rights.

Global trends towards increased protections and stronger enforcement regimes hamper access to copyrighted content, create problems for libraries and endanger the proper functioning of the copyright system. Moreover, through bilateral trade agreements, developing countries are made to adopt international standards of copyright protection that go beyond their WTO-TRIPS obligations.

Exceptions and limitations

There are three broad categories of exceptions and limitations. The first safeguards fundamental user rights concerning the individual. Examples include public speeches, the right to make quotations, the reporting of current events, the right to parody, reproductions for private non-commercial use and home taping of audio or audio-visual works.

The second category reflects commercial interest, industry practice and competition. This includes press reviews, ephemeral recordings by broadcasting organisations, museum catalogues and de-compilation/reverse engineering of computer programs for interoperability.

The third category concerns society at large and promotes the dissemination of knowledge and information. It includes provisions for libraries, educators for teaching and research, people with disabilities, reporting of parliamentary and judicial proceedings and religious celebrations.

In addition, some countries have an "all-purpose" general exception. In the US, this is known as the doctrine of "fair use". Codified in US copyright law, it has evolved through court decisions over the years.

The UK has a similar concept known as "fair dealing", which covers mainly research and private study, criticism and review, and news reporting. The precise definition and interpretation of fair dealing is ultimately determined by the courts. Countries which are former UK colonies are likely to have inherited British copyright law and hence the fair dealing provision.

Copyright and libraries

Libraries are deeply affected by copyright law. The mission of libraries is to collect, organise, preserve and make available the world's cultural and scientific heritage for current and future generations. Different types of libraries (such as the national library, public libraries, academic libraries and workplace libraries) serve different people and purposes. But they all facilitate sound democratic governance and the development of society by providing access to information, ideas and works of the imagination that people, communities and organisations need.

Libraries in developing countries are contributing to national development by supporting education and training. As the main purchasers of expensive reference works, online databases and electronic journals, they are fostering the creation of a market for information products, especially for local content industries.

Digital technologies are transforming how copyrighted works are created, disseminated and used, as well as how libraries and archives preserve and make these works available. ICTs create the potential to level the playing field so that even people in poor countries have access to top-quality global resources.

For example, millions of academics and researchers in developing countries are benefiting from access to major databases of journals in humanities and literature, science and technology and business information through their libraries, such as those available through the eIFL.net consortium (www.eifl.net). In future, students in developing countries can have access to the same resources as a student in the West.

Copyright law governs the ownership, control and distribution of knowledge. The role of libraries is to provide people with access to knowledge and information. Copyright is therefore a professional issue for librarians.

Exceptions and limitations are the cornerstone of access to copyrighted content. Without them, copyright owners would have a complete monopoly over use of copyrighted materials. Works in copyright could only be sold and lent. Libraries, and the people using them, could only view or read copyrighted materials. All other uses would require permission.

This would threaten the functioning of libraries and affect the public interest, including interfering with the free flow of information. Thus, libraries cherish the public policy goals enshrined in the principle of exceptions and limitations, and insist on their continued applicability in the digital age.

Today, we live in a global digital environment. But the exceptions and limitations were developed in the analogue world. They are still paper-bound although the basic format for most content has become digital.

The agreed statement to Article 10 of the WIPO Copyright Treaty was an attempt to provide a remedy for such future issues. More than a decade on, the issues are too complex to be addressed solely

by this general statement expressing an intention. This is why libraries and others have been calling for a minimum set of exceptions and limitations, for example, as part of an international treaty on Access to Knowledge.

Exceptions for libraries

The recent WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives (WIPO document SCCR/17/2) for the first time gathers library exceptions and provides a survey of the copyright law of 149 WIPO member states.

It concludes that the prevalence of statutory library exceptions indicates that policy makers recognise the important role that copyright law plays in the ability of citizens to have continuing access to library materials. But the study also finds that there is a demand amongst librarians for more supportive legislation and clearer laws that would apply to the services they deliver.

Inadequate exceptions and limitations may result in the loss of irreplaceable cultural and scientific heritage or may impose unrealistic costs on libraries and their patrons. Here are some common scenarios:

1. Libraries contain a wide variety of print material often not available anywhere else in the world but which are of important historical, political and cultural value, e.g., newspaper collections. Without an appropriate exception, the library cannot copy or digitise the newspaper in order to preserve it. Unless developing countries have adequate exceptions for archiving and preservation purposes, their documentary heritage may disappear and may not be available to future generations.
2. The process of digitisation is expensive and libraries often cooperate with partners in other countries to share resources. However, if preservation exceptions in each country are different, libraries cannot participate equally as the burden of digitisation will be placed on those with more liberal regimes, while the others will not have access to the digitised content. If libraries in developing countries do not have adequate provisions, they may find it difficult to attract partners in other countries and they may be left out of important digitisation projects.
3. A public library buys an expensive set of encyclopedias on CD-ROM, popular with children doing their homework in the library. One of the CDs gets damaged and cannot be used. It is not possible to buy a single replacement disk. Unless the library is able to make a back-up copy, the entire set loses its

value. The library then has to repurchase the whole set; if it cannot afford to do this, the children are deprived of the use of the encyclopedia.

4. Literacy classes for adults are held in the library. The literacy coordinator visits the library to select the texts for the next class, a magazine article and a poem, and to arrange for photocopies to be made for the students. Without appropriate exceptions, the library may be prevented from providing this service, which may even restrict copies from being made at all.

Thus, certain core exceptions and limitations are essential for libraries to fulfil their public interest mission and the needs of their users. These include exceptions and limitations for:

- reproduction for libraries and archives to enable preservation and archiving of a nation's cultural and scientific heritage (print and digital), as well as for general purposes to enable the library to fulfil its mission;
- inter-library document supply: a collaborative system of resource-sharing amongst libraries because no single library can own every book, journal or published work;
- reproduction for private purposes and research, so that a person can make copies for a variety of non-commercial purposes in their everyday lives, one of the most universally accepted exceptions and limitations in national copyright laws;
- the use of quotations, which is important for education, research and entertainment;
- reproduction for educational activities, key to economic and social development, to facilitate day-to-day work in teaching and learning institutions, and to maximise the use of learning resources;
- reproduction for translations to enable a person to read in their own language, considered to be essential for social and economic inclusion;

- reproduction for persons with disabilities to enable up-to-date material to be made available in accessible formats at low cost;

- temporary reproduction in the internal storage area of a computer, without which it is impossible to access digital material;

- communication to the public for educational and research purposes for countries that have implemented the WCT.

Crucially, exceptions and limitations should not be overridden by technological protection measures (TPMs) or by contract.

Exceptions and limitations are the current focus of attention by legislators, policy makers and academics in several countries. It is thus timely for this issue to be debated at WIPO.

WIPO studies in this area (exceptions and limitations in the digital environment, by Ricketson, SCCR/9/7; for blind and visually impaired people, by Sullivan, SCCR/15/7; and libraries and archives, by Crews, SCCR/17/2) were presented at an information session during the November SCCR meeting.

Leading academics Professor Ruth Okediji and Professor Bernt Hugenholtz made a recommendation in their report "Conceiving an International Instrument on Limitations and Exceptions to Copyright" (2008) that a global instrument on exceptions and limitations is necessary.

The WIPO discussions thus come at a time when there is increasing desire by many to find a solution that enables contemporary copyright law to meet the legitimate needs of users in the knowledge society.

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